THE LAW OF NATURE.

A SOMEWHAT noteworthy feature of recent social philosophy is the apparently quite general discarding of the time-honored doctrine of natural right or natural law. To say that this theory no longer has any adherents would doubtless be too strong. These are probably still numerous in legal science, scarcely less so in ethical philosophy, somewhat fewer in general sociology, and quite rare in political economy. But whether few or many, most of them seemingly are in that peculiarly modest mood which becomes the professors of a creed that is daily characterized as a great superstition, an exploded fallacy, a chimera of abstract ethics. What, with such very mild defenders and such vigorous enemies, the venerable doctrine is almost out of court. And, really, when one reminds himself that for nearly twenty-two centuries this doctrine had practically universal acceptance, that it was the creed of Plato, Aristotle, Cicero, Marcus Aurelius, Gaius, Augustine, Aquinas, Grotius, Hooker, Locke, and Kant, its present forlorn state is certainly somewhat noteworthy. Hardly less noteworthy is the diverse character of its enemies, especially the presence among them of one class—the radical reformers. In every other epoch reformers, as such, have made the appeal from the existing order to the ideal order, from man's iniquitous law to nature's righteous law, their chief reliance in the conflict with long-established abuses. In our day, for the first time, they demand the discarding of this conception as a needless fiction, a senseless obstacle to social progress. An unsympathetic observer might be tempted to remark that, so long as there remained anything of the old order to demolish, the reformer very piously appealed to eternal right against the artificial wrongs of that order;

but when he has disposed of the last vestige, has perfectly cleared the ground for himself, then he promptly casts aside the conception of an order which claims ultimate supremacy, lest it should set some limit to the exercise of his own sweet will in the proposed reorganization of society. But, of course, this would be quite uncharitable. The impatience which reformers feel toward natural law as a needless obstacle, is doubtless sufficiently honest in motive, though, as a practical measure, it might suggest the analogy of the engineer who should insist on the abolition of weight and friction as the necessary prelude to the construction of a stone fortress. Such an analogy would serve to remind us that, while law sets limits to the range and method of our activity, it is nevertheless quite essential to give stability, or even reality, to our work. However, we are not concerned either with the motives of the new school of reformers or with the practical consequences of their teaching. The simple fact is that there is a most astonishing acquiescence in their denunciation of the doctrine here considered. Is this acquiescence warranted? Is natural law a myth? an exploded fallacy?

The conviction of the writer that consent to this proposition has been somewhat too hasty; that, in fact, even if we choose to discard the name, still all that is essential in the doctrine remains and must remain — this conviction will explain the preparation of the present article. In defending this view, the writer proposes, first, to define natural law; secondly, to maintain the reality of natural law against current objections; and, finally, to argue for the fitness and effectiveness of the phrase, natural law.

I. NATURAL LAW DEFINED.

A proper understanding of what is meant by natural law is best obtained by getting a clear idea of its primary, central principle. This we find to be the assertion that there

exists a standard of right independent of, and supreme over, the will of man. That this principle is the truly primary element in natural law, is most clearly established from a consideration both of the circumstances attaching to the origin of the doctrine and of the practical part which it has played in the course of history.

As to its origin, we learn from Zeller[1] that the concept natural right was first isolated, as in antithesis to positive or legal right, by Hippias, a sophist of the last half of the fifth century before Christ. As is well known, Greek thought at the epoch named was just in that stage of critical scepticism which necessarily precedes any real development of science or philosophy. In ethics, as everywhere else, this spirit was bound to show itself. Enforced by teachers, poets, and statesmen, as binding on all, was a great body of maxims, customs, laws. It was inevitable that the new school should address to these rules of conduct an ethical *quo warranto;* should ask whether, after all, these rules constitute the ultimate right; whether back of the right which springs from enactment (θεσει) there is not also a right which is from nature (φυσει).[2] Felix Dahn very justly remarks that the asking of this question is the beginning of political philosophy: he might have added, of ethics and scientific jurisprudence also. Indeed, he might have gone a step further; he might have declared that, if the question be answered in the negative, we have, with the asking and the answer, not only the beginning, but also the end, of all ethical philosophy; for, if there is no law, no order independent of and rightly dominant over the capricious will of man, there is certainly no rationality in the domain of right.

We have thus seen that in its origin the concept natural law had no significance except in antithesis to humanly-enacted right, and so was essentially the assertion that

[1] Pre-Socratic Philosophy, Vol. II. p. 476.

[2] Felix Dahn in Bluntschli's Staatswörterbuch, art. "Rechtsphilosophie."

there exists an order of right of non-human origin, an order prior to, independent of, and dominant over the right of human origin. The same appears when we examine the history of its practical applications. It is a familiar fact to the student of history[1] that the concept natural law has played a principal *rôle* in the three great historic movements, three great epochs of civilization: I refer to the development and perfecting of the Roman jurisprudence, the evolution of modern international law, and the making of that revolution which, beginning in France, has established, or is establishing, in all Europe the ascendency of democratic ideas. Now, what is the essential nature of the concept which in these different epochs accomplished such vast results? Let the circumstances of the case make clear what the concept must have been in order to serve such purposes. In the case of the Roman law there was a mass of regulations for human conduct—harsh, cruel, petty, inconvenient. Yet they were supported by the self-interest of considerable classes, by the force of habit, and by that semi-religious reverence for the past and that rational reverence for law which were so strongly ingrained in the Roman character. They belonged to the old order under which the City of the Seven Hills had become the mistress of the world. To maintain them became, in the waning days of the republic, a sort of religion. The mighty Julius had presumed to treat them lightly, to begin clearing the ground for a newer order. Death had stayed his impious course. Augustus, more politic, if not more pious, allied himself with the past. The old order seemed more firmly rooted than ever. Here, as in every such crisis, it was necessary that the reformer should lead men to believe that the old laws and institutions were, after all, of human enactment; that from them there is a legitimate appeal to an order of rights which is perfect as they are imperfect, eternal as they are temporary,

[1] See Maine, Ancient Law, ch. iv.

from nature as they are from man. Such an order of rights was set up under the name of Natural Law as a standard into conformity with which the laws should be progressively brought by the edicts of the prætor and the responses of the jurisconsults. In like manner, when Grotius undertook the task of formulating a code to govern the conduct of states in their mutual relations, he evidently had need of the same conception. The phenomenon which Europe presented to him, was that of an almost accidental group of states, having no organization for the enforcement of justice, and having but few conventions which might supply the place of such organization; a group of states which, in the expressive phrase of the times, were, with reference to each other, in a state of nature, *i. e.*, a non-political state. Are these states at liberty to follow the dictates of passion or self-interest? Are there no laws binding on them? Surely there are! answers the school of Grotius. Older and higher than the laws or conventions of man is a justice that needs no enactment by him, a justice which is from nature, a justice which "must forever reign, eternal and imperishable." Exactly similar was the case of the mighty upheaval which ended the domination of the aristocracy. Here was an order of things so evil, so corrupt, so productive of suffering and misery, that to-day it can find scarcely an apologist. Yet it had the advantage of prescription; it was securely in possession; it was sustained by the traditions of the past and by the sanctions of religion. Here, again, there was but one course to pursue. The existing order of rights must be exhibited as a purely human justice in clear antithesis to an extra-human, supra-human justice. This task was, of course, twofold. To set up the first member of the antithesis, to establish the purely human origin of the existing order—this required a destructive philosophical and theological critique. The task was undertaken and performed all too well. The good and the evil went down in indiscriminate ruin. The second part of the task—the completion of the antithesis by setting

up the original, non-human order as the true standard—this was accomplished no less effectively, and, unfortunately, with many errors of theory and many errors of statement which had serious immediate and remote consequences. These errors were inevitable in the extraordinary moral and intellectual ferment of the times; inevitable in the strange circumstances which assigned to literary men, and particularly to one half-mad, uneducated child of genius the *rôle* of philosopher and teacher; inevitable when the lack of the public press relegated to the *salons*, where wit and sentiment and beauty reigned, the settlement of questions the most profound and difficult that can exercise the minds of men; inevitable when the tremendous contrast between the commonest ideal and that incarnation of everything cruel, oppressive, and degrading which constituted the actual order must have appalled the stoutest heart and shaken the soundest judgment. The theoretic excess and confusion thus inevitable were followed by practical excesses unwarranted by the wildest flights of speculation. In consequence, the doctrine of natural law became thoroughly discredited and its part in the mighty drama obscured. But no candid student of history can fail to discover that, in a very important sense, the doctrine of natural law made the revolution possible; and that it accomplished this, not because of the peculiar form of the doctrine then held, not because of its errors and absurdities, but because of this one central epoch-making idea which it affirmed to all men's minds, that in natural and just supremacy over every order of human enactment there is an order of right which has "not been established by opinion, but by nature."[1]

The correctness of the above analysis of the concept natural law, which finds its essential element to be the assertion of the non-human origin of that law, as opposed to the human origin of positive law must be admitted, it would

[1] Cicero, Laws.

seem, by everyone. It certainly is implied by every author who makes the antithesis of positive and natural law his starting-point, even though, in giving a technical definition of the conception, he makes some other element conspicuous. To multiply citations would be both tedious and unnecessary. But there is one book which I had the good fortune to take up when this article was nearly completed, which puts the case so explicitly and so lucidly that I cannot refrain from making a full quotation:

"The term nature . . . is exceedingly well adapted to designate ideas which we wish to look upon as *independent of human activity*, whether it may be physical or mental, or as being antagonistic to it. The *humanly* positive is opposed to what seems a *natural formation*. . . . Hence, the absolute law, supposed to be *independent of the human will*, has, ever since the earliest days of philosophizing, been denominated the law of nature." [1]

Having thus indicated the primary, essential, element in the doctrine of natural law, we must now set forth the subordinate conceptions which make up the more positive content of that doctrine as held by individual thinkers. These different conceptions are very numerous; but it is believed that the following conspectus will give a fairly adequate exhibit of the principal ones, and also of their mutual relations.

I. *Chief Conceptions entering into the Different Forms of the Doctrine of Natural Law.*

1. A law DETERMINED BY the nature of things, *i. e.*, the very essence of things. "Natural laws have their foundations in the very nature and mutual relations of things."—*Burlamaqui.* "Natural law is that for which there is sufficient reason in the very nature of men and things."—*Wolff.*

1*A*. A law DEDUCIBLE by human reason from the very nature of things. This, of course, follows as a corollary from 1, provided we affirm the adequacy of the human reason and understanding. "The law of nature . . . is the law, the body of rights, which we deduce from the essential nature of

[1] Pulszky, The Theory of Law and Civil Society, p. 77.

man."—*Lieber.* "Those external laws, the obligatoriness of which can be recognized by reason *â priori* . . . are called natural laws."—*Kant.*

2. **A law** EMBODIED in nature. This has generally implied a theistic basis. God is the author of nature. Upon it he has stamped his own righteous will. It is possible in our day to hold this theory on the evolutionist hypothesis that through development the world-order has become an ethical world-order. This conception is rather implied in the theories that follow than independently held.

2*A*. A law LEARNED FROM, READ OUT OF nature. This is plainly a corollary from 2, when perfect human capacity is admitted. It appears in several different forms.

2*Aa*. A law LEARNED FROM a broad and reasonable interpretation of ALL nature. This idea appears more or less in most of the eighteenth-century writers. The theist commonly finds no difficulty in holding this idea coincidently with 1 and 1A. It supplements the knowledge of natural law derived from other sources.

2*Ab*. A law EMBODIED IN and LEARNED FROM the HIGHEST PART of nature, *i. e.*, REASON. The Stoic doctrine. Here belong the "innate-ideas" doctrine, and some forms of intuitionism perhaps. A view more widely confessed than any other. Probably not usually clearly distinguished from 1A by those who hold it. Certainly it was not in antiquity. Not easily separable from the next idea.

2*Ac*. A LAW WRITTEN ON and to be LEARNED FROM the moral nature of man, the heart, or CONSCIENCE. This brings forward the emotional side in contrast with purely intellective reason. "The will of God as revealed in the heart and conscience of those who seek to know it."—*Rolleston's Epictetus.* "Those principles which are implanted in the heart and mind of every man."—*Levi.* This and the preceding ideas very naturally led to the emphasis of the fact of common acceptance by the nations as evidence of the truly essential character of a rule of right. Hence the identification of *jus naturale* and *jus gentium.* "The *jus gentium* was to the Romans the law of nature *found in* and applicable to all men and to all countries."—*Levi.*

2*Ad*. A law to be learned from the instinctive nature of man. This hardly had an independent existence. It, of course, appears under 2Aa, *i. e.*, in interrogating nature as a whole, and in that connection it received undue emphasis from the eighteenth-century writers.

3. That part of natural law or natural morals fitted to be enforced. This plainly is easily fitted to any form of the natural law doctrine. It brings out the antithesis of *moral* and *jural* (*Whewell, Lieber*), while other specifications had only brought out the general antithesis of *the just* and *the legal.* This distinction has become in modern times an important element.—*Holland.*

B. Minor Additional Conceptions entering into the Doctrine of Natural Law.

1. The law common to men and animals.—*Ulpian.* "Ulpian's extravagantly wide application of the term never seems to have gained currency."—*Holland.*
2. A law enacted and enforced by nature personified; a figure of speech, or a euphemism for deity.
3. The law prevalent in the state of nature. Vaguely used by Locke. Figurative, and of no importance. Locke's doctrine was 1A or 2Ab.

The least consideration of the diverse elements which have thus entered into the different forms of the doctrine of natural law will suggest that no general verdict against that doctrine can be obtained merely by proving the unsoundness of any one or two of these conceptions. But that this is all that a large part of current objections even try to accomplish will appear as we consider them. The fact is, that the phrase natural law, implying, as it does, nothing more than the non-human origin of right, or justice, naturally lends itself to a great variety of ethical theories. One who rejects it without qualification is, therefore, obliged to disprove, not some particular theory as to the determination of the positive content of justice, but the very notion that there is any such thing as a justice other than legality. That no one has done this, or is likely to do it, to most men hardly needs demonstration. But let us make a systematic critique of the adverse arguments.

2. NATURAL LAW DEFENDED.

The first objection which we consider demands our attention, not because of its intrinsic importance, but because it has been dignified by the patronage of Sir

Henry Maine. It asserts a necessary connection between natural law and the belief in a primitive state of nature, wherein men lived without any common political superior. But, of course, the latter belief has been generally relinquished. Therefore the former must be. With Maine, the existence of such a relation between the two beliefs is both historical and logical. Thus, he says, "The belief gradually prevailed among the Roman lawyers that the old *jus gentium* was, in fact, *the lost code of nature*, and that the prætor in framing an Edictal jurisprudence on the principles of the *jus gentium* was gradually restoring a type from which law had departed only to deteriorate. The inference from this belief was immediate that it was the prætor's duty to supersede the civil law as much as possible by the Edict, to revive as far as might be *the institutions by which nature had governed man in the primitive state.*" So again this writer, and after him Huxley, "Logically, it [natural law] implied a state of nature which had once been regulated by natural law."

Now as to the extraordinary statement about the Roman lawyers, we are saved the necessity of proving its utterly unhistorical character by a later passage from the same author. Thus, from Chapter IV. we read: "The jurisconsults do not speak clearly or confidently of the existence of such a state [*i. e.*, a primitive state of nature], *which, indeed, is little noticed by the ancients*, except where it finds a poetical expression in the fancy of a golden age."

So much for the alleged historical connection between the belief in natural law and the belief in a primitive state of nature wherein that law prevailed. Is the claim for a necessary logical connection of the doctrines any better? First, let us realize that the state of nature, a belief in which, Maine claims, is involved the doctrine of natural right, means a primitive epoch in which there were no institutions, no rulers, no laws enacted by man—an epoch in which Nature governed. Now, it is affirmed that, when I

declare my belief in a natural law which *here* and *now* is superior to the laws of the state in which I live, I also necessarily imply my belief that society was once without an external political order. Was ever an alleged necessary implication more baseless? There is, indeed, an implication in the very word law. It is that there is a jurisdiction or realm wherein the law is dominant, and that the beings alleged to be subjects of that law are in the condition or state of being under that jurisdiction. Such an implication is involved in the phrase natural law. And surely those who assert their belief in that law have no disposition to deny the implication. There *is* a jurisdiction of nature, a state of nature, if you please to call it so. It is right here among us, in the fact that natural law regulates all those relations not regulated by positive law or by moral law in the stricter sense of the term, and in the fact that it is the ideal which more and more regulates all truly just positive law-making. But, whether man was ever in a state of nature in the ordinary sense of the term, whether he was ever without a political order,—concerning this question there is absolutely no implication in the doctrine of natural law.

The second class of objections to be considered includes those which find expressed or implied in the doctrine of natural right some special metaphysical theory of nature now generally rejected. One of these is implied by Maine when he traces the doctrine to that particular view of physical nature commonly held by the ancients which represents nature as simple, homogeneous, resolvable into the activity of a single essence as fire or water. Now, if Maine meant to imply that the doctrine of natural law depends on our believing in the unity of nature in a sense not common to modern philosophy, he was certainly in error. Some general cosmology is, of course, implied in the reference of the ideal law to nature, viz. this much, that the universe is a rationally ordered totality. But it is scarcely necessary to say that the unity and simplicity

of nature in this sense is the postulate of all philosophy and all science. It may be that this rationality which we assume and which we seem to find through experience is, after all, derived from ourselves, is thought into nature and then rediscovered; but to us, in any case, if we are to think at all, nature can never be divested of that rationality. So much is the common property of philosophy in all ages, and it is only in this sense that the unity of nature is an essential implication of the doctrine of natural law.

A second misconception as to the necessary metaphysical implications of the doctrine is that it assumes a theistic origin of the universe. This objection is met in the same fashion. Of course, as appears in the above conspectus, there are theistic forms of the doctrine. But the most important form, that which asserts that the ideal is determined by and (as is usually added) is deducible from the very nature of men and circumstances—this assumes nothing more than the uniformity of cause and effect in nature. Now, whatever may be true of theists, it is certain that the agnostic, who alone objects to the doctrine of natural law because of its theistic implication, also denies that the postulate of a rationally ordered universe carries with it the implication of a divine author. He cannot, therefore, maintain the theistic implication of a doctrine which needs no other postulate than just that of such a rationally ordered universe.

But, further, there is not only no logical implication of a theistic universe in the doctrine here discussed; there is, also, no such uniform connection of the two ideas in usage. The doctrine has been held by men of every religion and of no religion, by theists, pantheists, and atheists. The greatest of the modern expounders of the doctrine, Grotius, takes especial pains to show that the doctrine implies nothing as to the existence of God—that it can easily be maintained on an atheistic basis. So Burlamaqui, defending Grotius, declares that, "independent of God, considered

as a legislator, the maxims of natural law, having their foundation in the nature of things and in the human constitution, *reason alone* imposes on man a necessity of following those maxims."

This is perhaps as good a place as any to comment on an objection to the doctrine of natural right very strongly emphasized by Professor Huxley. This writer derives from some unknown source a conception of natural rights which leads him to define such a right as "in reality nothing but a statement of that which a given being tends to do under the circumstances of its existence; and which, in case of a living and sentient being, it is necessitated to do, if it is to escape certain kinds of disability, pain, and ultimate dissolution." From such a conception of the doctrine it follows naturally enough that the tiger has a right to eat the man and the man has a right to slay the tiger. All natural rights exist without correlated obligations, and the whole theory is a mere jumble of contradictions. Now, it must be well known that no such definition of natural rights could anywhere be found. Whence did the writer derive his conception? Perhaps from the definition of Ulpian, that natural law is the law common to men and animals. But "Ulpian's extravagantly wide application of the term never seems to have gained currency."[1] Perhaps, then, this definition was deduced from the doctrine of Hobbes, that by nature every man has a right to everything. But, as any person venturing to discuss this subject surely knows, the views of the above-named writer are not in the least sense typical on the subject. Such a theory as his necessarily substitutes a reign of force for a reign of law, and is, in reality, only another form of the denial of the very existence of natural law. Is there any *accredited* theory of natural law which, by ingenious interpretation, will yield such a definition as that given above? Yes, it must be admitted that the

[1] Holland.

second class of theories is in danger of some such interpretation. If we are to find natural law written in nature, and if the nature which we have especially in mind is instinctive nature, it would not be hard to argue that natural law is what a being tends to do under given circumstances. But this concession, after all, will avail nothing to the objector; for we cannot secure a verdict against natural law in general by attacking merely one particular form of that doctrine, and against the theory that natural right is determined by the nature of men and circumstances, this objection of contradictoriness has no force whatever. But the subject ought not to be passed without remarking, in justice to those theorists who believe they can find the eternal law written in nature, that to them nature is no mere aggregate of isolated, unrelated elements. It is rather a great organic whole, in which there is real, though not always apparent, harmony. They fairly argue that the thought of God is to be read like that of a human writer. We may not cull here and there a phrase and set it over in antithesis and apparent contradiction to some other phrase. On the contrary, if we would understand and justly interpret, we must consider the significance of each expression in the light of the whole. That even this method of reading the revelation of God through nature leaves doubt in the minds of candid students as to its possessing a teleological character, one can easily believe. But to attribute to the advocates of this theory the folly of asserting the propriety of unhesitating obedience to every natural instinct without any effort to place these in proper relations of coördination and subordination in a great totality—this is simply ridiculous.

We come now to consider the most important class of objections to the doctrine of natural law, those which grow out of fundamental ethical controversies. These controversies, which concern the method as well as the matter of ethics, have yet to reach any real settlement. Still there is doubtless a very widespread tendency to adopt some

form of utilitarianism. There is a good deal of disposition to protest against *a priori*, deductive methods, and against intuitionism when understood as furnishing a complete body of ethical rules. There is a quite extensive acceptance of the application of the doctrine of evolution to ethical matters, and a consequent assertion of the principle that every actual ethical standard is nothing absolute or necessarily trustworthy but a mere development—a subjective opinion of the social group determined by its total past and in no sense possessed of universal validity. Finally, this group standard is looked upon as a thing which not only *is* relative to the past history of that group, but as well *ought* to be so relative. Now by a large class of writers the doctrine of natural law is supposed to be in necessary antagonism to all these tendencies of recent ethical speculation. It is stigmatized as intuitional, *a priori*, deductive. It is placed in antithesis to utilitarianism, in antithesis to the theory of the historic nature of actual standards, in antithesis to the doctrine of the metaphysical relativity of the ideal standard. That all of these objections grow out of misconceptions as to the necessary implications of the doctrine here defended, I will try to show in the following pages.

First, let us consider the charges of intuitionism. Now, this may mean one of at least three different things. It may mean that the whole body of ethical doctrine is revealed to the human mind in a series of propositions to which the mind is necessitated to consent by its very constitution—innate ideas incorporated, so to speak, in the organic structure of reason, incapacities rather than powers of the mind. Secondly, intuitionism may mean that reason is able to discern the whole body of ethical doctrine immediately, not because of some forms of thinking stamped upon itself and limiting its activity, but because it has the power to perceive *truth as such*. We see that the sums of equals are equal, not because we are made so, but because the sums of equals *are* equal. Thirdly, intuitionism in

ethics may mean, not that the whole body of ethical truth is thus perceived by reason whether as due to its weakness or its strength, but merely that there are one or more categories, one or more principles, the existence of which must be assumed, however we explain their origin. Behind them we cannot go. They are incapable of proof; they need no proof. Now there is no doubt that a very common form of the doctrine of natural law contains intuitionism in the first sense. Those who define natural law as that law which is written on the hearts and minds of men (see above *2Ab* and *2Ac*) seem to place their dependence, not on the power of reason to see truth face to face, but rather on the trustworthiness of the mind's structure as a document revealing the thought and purpose of the creator. It may be doubted, indeed, whether such writers have trusted so implicitly to their special means of reading the mind of God as consistency would have demanded. The principle of a *summum bonum* has probably always exercised an unconscious corrective influence in interpreting the apparently natural and genuine deliverances of man's psychic nature. But, in any case, while we have to admit that this sort of intuitionism is a correct characterization of some forms of the doctrine here considered, it is evidently absurd to hold that it established a general verdict against a doctrine which in the hands of its greatest expounders has not taken this form. For it is plain on the least reflection that this charge has no application to that form of the doctrine which defines natural law as the law determined by the nature of things. The same sort of reasoning applies to the second form of intuitionism. Doubtless there have been writers who believed that the whole body of ethical doctrine is seen intuitively by reason; but that the doctrine in general, or in its most important form, teaches the existence of a special deliverance of the reason for every particular duty or right, that it denies the possibility of reducing all laws of duty to some one proposition—such a view is not to be admitted for a moment. So far is this

from being the case, that the overwhelming majority of ethical teachers from Aristotle down have endeavored to discover just such a single principle which, embodying the *summum bonum*, should supersede all lesser principles of the law of nature. But is not the doctrine of natural law intuitionist in the third sense? Certainly it is: but so is every other conceivable body of scientific doctrine, whether ethical or economic or mathematical. We must start somewhere. We must assume some categories and some principles. Bentham taught that men ought to pursue the greatest happiness of the greatest number. Mill added the conception of diverse sorts of happiness differing in natural essential worthiness, and taught that men ought not only to choose the greatest happiness, but also the *highest* happiness. Now here are several categories—"ought," "highest kinds of happiness," etc., which are plainly original, underivable. The principle embodying them is also admitted by all utilitarians to be underivable. Mill asserts that we cannot prove to any doubter that he ought to choose the higher happiness. If he fails to understand, we cannot even explain to him the difference between higher and lower forms of happiness. Yet no less certainly is he morally constrained, when he is able to discern that difference, to choose the higher. The principle of utility, in short, is incapable of proof, and, according to its advocates, needs no proof. Here, then, we have an intuition, if you please to call it so; something, at least, which is not to be derived from sensible experience. Utilitarianism is therefore intuitionist. In the same sense is every other doctrine of natural law. (As I shall show later, utilitarianism is merely one form of the doctrine of natural law.)

But the doctrine is further characterized or stigmatized as *a priori*. What is to be said of the truth of this charge? Here, again, we need to remind ourselves of some very common-place truths *A priori* and *a posteriori* are merely different methods of arriving at the truth, either of which

cannot long be pursued to the exclusion of the other. Both need to be used, but not necessarily in the same proportion. It is therefore illogical to characterize any writer as *a priori* or *a posteriori* unless we merely mean that such writer uses to excess one or the other method. But whether or not this shall be the case, depends much more on the temperament of the individual thinker than on the creed which he professes. There is no doubt that many ethical writers have used the *a priori* procedure to excess. But many, on the other hand, who have held to the second group of theories, that is, who have taught that natural law is imbedded in nature, and is to be read out of nature —these have used the empirical method to excess. Between such a writer and the utilitarian the only difference is one of constructive principle. The latter asserts that the moral quality of acts is to be ascertained by considering their fitness to produce happiness, and then tries to learn from experience what acts are contributory to this end. The former merely starts with a different postulate, viz.: that whatever God has written in nature is right, and then proceeds, as utilitarianism commonly does, to learn from experience what God has thus written. But, while the theistic form of natural law is almost of necessity empirical, it is perfectly possible to apply the principle of utility by the *a priori* procedure: for it is perfectly possible to infer from the essential nature of man, without waiting for experience, that a certain course of action will or will not conduce to the general happiness which is identified as the *summum bonum*. The fact, therefore, is that natural law, as such, cannot be characterized as *a priori* or *a posteriori*, as deductive or inductive. Such epithets help to gain the suffrage of the crowd, but they contribute nothing to the scientific solution of the question.

Let us now consider the alleged antithesis between natural law and the characteristic doctrines of recent ethical speculation. First, is there any necessary antagonism between the theory here defended and utilitarian-

ism, as such? Is it correct to speak of utilitarianism, as Lightwood does, as having superseded natural law as the regulative principle of positive law? Most decidedly it is not. The true statement of the case is that utilitarianism, *as a particular form of natural law doctrine*, has superseded the earlier forms of that doctrine, which more obscurely asserted the same principle of utility. For certainly utilitarianism is only a particular form of the doctrine of natural law. In fact, it is a theory which, with special appropriateness, can be designated as a natural-right theory of ethics. Its most natural antithesis is the scholastic theory which finds the determinative source of moral quality to be the will of the Creator. In contrast with that theory, utilitarianism says that an act is right or wrong in proportion as it conduces to happiness; and, as this is determined by the nature of men and of circumstances, right and wrong are *independent of any will.* Even God cannot change them. If he exist at all, he, just as well as we, ought so to act as to secure the greatest happiness to the greatest number. Now what possible quarrel can such a theory have with the doctrine that asserts that right is fixed from eternity by the nature of men and circumstances? This view of the matter is warranted also by the history of the case. There were utilitarians before Bentham, and they all understood themselves as believers in the doctrine of natural law. Not only so, but in a certain important sense of the term almost all the great interpreters of the doctrine have been utilitarians. The overwhelming majority of ethical writers from Aristotle down have held that the ultimate determinant of the moral quality of acts is their relation to an absolute end called the *summum bonum;* and, not only so, but the majority have set up happiness in some form or other as that *summum bonum.* So Hooker, Grotius, Puffendorf, and Burlamaqui.

Again, is there any legitimate antagonism between the doctrine of natural law and the current view of ethical

ideals as the product of a prolonged evolution through the ages? None in the least. If any man can bring himself to hold such views, he is perfectly able to do so and still believe in natural laws. The question how men have attained to their present ideal of duty has nothing at all to do with the question as to whether there is an absolute ideal determined by the nature of things. The particular content which I am accustomed to assume under the term, may be the merest product of imagination, superstition, caprice even, if you please; but this does not disprove the existence of an ideal that it is independent of every such contingent element. The doctrine of natural law in its essential form merely asserts that in every time and place there is a right course of action, one, eternal, immutable, because it is determined by the unchangeable nature of things. Human ideals may come and go whence and whither you please, but the true ideal, which "depends not on its being or not being received," goes on forever.

We are thus brought to the last of the antitheses commonly supposed to subsist between the doctrine of natural law and current ethical speculation. Is that doctrine in necessary antagonism to the theoretic relativity nowadays commonly asserted for all ethical ideals. According to this newer fashion of stating things, "There is no universal human right to personal freedom, outer or inner freedom, freedom of conscience or of belief, but only so much as in any particular time men can bear. What we to-day consider most absurd: slavery, coercion of opinion, polygamy, each not only was in its own time . . positive law, but to a candid judgment . . . is able to manifest itself as *the inwardly rational*, in so far as it is the historically conditioned entrance-way to higher forms."[1] In contrast with this relativity of the ethical ideal, natural law, it is said, takes no account of varying circumstances. "It makes the demand that actual law shall immediately

[1] Lasson, Rechtsphilosophie, p. 258.

and without delay transform itself in accord with the plan of natural law."[1] Now I most emphatically deny that this is in any sense a legitimate interpretation of the doctrine of natural right. On the contrary, whatever of truth there is in Professor Lasson's sweeping remarks about human rights, slavery, coercion of opinion, etc., is perfectly consistent with the doctrine of natural law when properly stated. Plainly, nothing more is proved by the reasoning of the passage quoted than that there is no unlimited, inviolable, never-to-be-trespassed-upon right to liberty. But surely this declaration is not inconsistent with the assertion that every man has a natural right [*i. e.*, a right not depending on human enactment] to liberty. A natural right is no isolated, unrelated, unlimited claim. It is nothing save as a member of an order of rights in which it is subordinated not only to the great whole, but also it may be to many particular rights. In this order of right it is a natural law that the lower shall yield to the higher, the particular to the general. If slavery was ever right, it was not because the individual man has no natural right to free self-determination, but because in the peculiar circumstances of the case the maintenance of that right was inconsistent with the maintenance of some higher, superseding right. But not only is this relativity of the ideal right consistent with the doctrine of natural law; more than this, it is the most distinctive mark of the most important form of that doctrine. The very essence of natural law is to be relative in this sense; for it is that law which is determined by the nature of men and circumstances.

"But surely," the objector will say, "you claim that natural law is eternal and immutable." Certainly; and just such a claim does everyone make for the moral ideal, whatever he may call it. Does the principle of utility admit any exceptions? Does that principle change from age to age? Surely not. Given a particular set of circumstances,

[1] Lasson, p. 257.

and there is just one possible course of action which, in that set of circumstances, will tend to secure the greatest good of the greatest number: there is, therefore, in that set of circumstances just one course, immutably right, eternally right. In truth, the immutableness of natural right, instead of being contradictory to its relativity, is, in a sense, a consequence of that relativity. It is because the greater part of right "has been fixed . . . by the order of the world and the nature of men and circumstances" that it is unchangeable. If the nature of men and circumstances change, we are wont to say that the law changes. But to speak exactly, we should say that a different law applies; but a law like its predecessor, eternal and unchangeable, because determined by the new nature of men and circumstances. This is only another way of affirming the immutableness of the law of cause and effect. The conditions under which the applicability of a law of nature is determined must be empirical and so subject to the limitations of time; but the relations of cause and effect necessarily involved in those conditions are purely rational, and so not limited by the form of time, or, in the common phrase, they are from eternity.

"Well, you certainly must admit that in the past the doctrine of natural law has been expounded so as to leave no room for regard to historic conditions?" No, that is not to be admitted either. It is doubtless true that in the revolutionary epoch natural law was commonly found alongside a fanatical, doctrinaire spirit which seeks to impose on communities that order which commends itself to the judgment of the individual without reference to circumstances; but that spirit belonged then, as now and always, to the zealous reformer as such, without reference to his ethical creed. Such a man always demands the instantaneous realization of his ideal, whether he names that ideal natural law, or God's law, or the moral ideal, or the inwardly rational, or the principle of utility. Again, it is doubtless true that even in the best statements of the

doctrine prior to the revolution, too little stress was laid on the right of actual circumstances to count in making up the total of the conditions determinative of natural law. With some writers the nature which is meant is only the *original, primitive* nature of things. With others the Aristotelian conception of the nature of a thing as its state or condition when *perfected* is most emphasized. Too little attention is paid to that nature of things which is neither original nor ultimate, but is in some stage of development from the original to the ultimate. Still this was not wholly lost sight of. Thus Burlamaqui says: "As man himself may make divers modifications in his primitive state, and enter into several adventitious ones, the consideration of those new states falls likewise upon the object of natural law taken in its full extent." But, of course, it is not to be denied that our own age has been the first to do justice to the adventitious elements in any given epoch, to give to those elements their legitimate share in determining the ethical ideal for that epoch. But, conceding this, conceding that the historic spirit in law and ethics has accomplished a great work in securing consideration for a side too often neglected in the past, we cannot admit that it has added anything not logically implied in the Wolfian definition of natural law, and more or less clearly present in the classic expositions of that doctrine.

We have thus passed in review the current objections to the doctrine of natural law, and have found that without exception they derive what force they possess from some misconception of the essential implications of that doctrine. To give formal completeness to our task, we ought, perhaps, to make a positive argument in favor of the doctrine. But, after the explanation which has here been given it; after it has been shown to involve essentially nothing more than the assertion that there is a right independent of the enactment of the state, it would seem not only needless, but as well an insult to the intelligence of the reader, to offer formal proof. It is indeed true that many cur-

rent writers seem to deny that there is any natural right, even in the above sense; and the practical use to which this denial is put as a method of clearing the way for reform legislation would indicate that it is no merely rhetorical denial.[1] Yet, when we consider the monstrous consequences of such teaching, we can but suppose that these writers do not mean what they seem to say. Mr. Davies, for example, cannot mean in the passage cited below, that, should a purely accidental group of men find themselves outside the jurisdiction of any state, the personal claims of the individual man would have no validity against the passion or caprice of his fellow. Yet this extraordinary conclusion is perfectly warranted by his assertion that there are no such things as "natural personal rights." According to that assertion, if two shipwrecked sailors met by chance on a previously uninhabited island outside any political jurisdiction, there is absolutely no moral obstacle to hinder one of these men pushing the other over the cliff and into the sea, as he might a fragment of rock. Of course Mr. Davies believes nothing of the kind. But his language is not merely liable to such interpretation, it is also, by any ordinary construction, *incapable of any other interpretation.* As a matter of fact, he doubtless believes that each of the men in our hypothetical case would be under morally valid obligations to the other, and that each would have morally valid claims on the other. But claims of one man upon another man which are morally valid, even in the absence of the express enactment of a political superior—these are just what men mean by natural rights. So that, whatever Mr. Davies seems to say, he doubtless believes in "natural personal rights." It is impossible, then, to avoid the conclusion that the contest is largely about words, that the

[1] "In ethics or theology no place can be found for natural rights inhering in the individual." J. L. Davies, London Spectator, October, 1889. "The first step must be to rid our minds of the idea that there are any such things in social matters as abstract rights." Jevons, The State in Relation to Labor, p. 6.

objections to natural law are, consciously or unconsciously, directed against the phrase rather than the thing. Let us then devote a little space to the consideration of the

3. PROPRIETY OF THE PHRASE NATURAL LAW.

And first, shall we continue to speak of the principles under discussion as laws? This, of course, depends on what we consider the proper significance of the term. If, with Austin, we are going to define a law as a definite command of a political superior, then plainly we must relinquish the use of the term in this connection. But it is hardly necessary to say that this definition is already rejected in the science of positive jurisprudence, and certainly will not be accepted in philosophy. So, again, if we adopt Dicey's limitation of the word to designate rules of conduct which can be enforced in the courts, we can no longer say natural law.[1] But this is just as little likely to happen as the other; for evidently such a definition would cut off international law, the laws of political economy, of biology, etc. The same considerations dispose of such dicta as this from Stahl: "There is no other law than positive"; or this from Bluntschli: "If natural law is not positive, then it is not law, but only an ideal of law." All such statements imply a definition of law which may answer well enough in a technical treatise on positive law, but has no place in philosophical discussion; for it is contrary to the best general usage, and deprives us of natural and useful analogies. Compare the relative effectiveness of the old word law and the phrases used by the writers who reject it, in a concrete case where we wish to bring out the antithesis of ideal right and actual right. Here is what the new terminology would give us: "Thirty years ago, by the law of South Carolina, the black man was a slave; but accord-

[1] The Law of the Constitution, p. 23.

ing to 'the inwardly rational' [Lasson] he was free"; or "according to 'the precepts of God's world-order' [Stahl] he was free"; or "according to 'the moral ideal' [Bluntschli] he was free." Contrast with that the old way: "Thirty years ago, by the law of South Carolina, the black man was a slave; but by the law of nature he was free." It is to say the least of doubtful policy to relinquish a mode of expression which has at once the support of almost universal usage and the advantage of rhetorical effectiveness.

"But, even if we insist on retaining the term law, may we not advantageously give up the adjective natural?" Perhaps; but let us see. There is doubtless danger of confusion with natural law in the purely physical sense.[1] That anyone should be led by any reading or thought on the subject to define natural law as "in reality nothing but a statement of that which a given being tends to do under the circumstances of its existence," argues that some people have been using the phrase with the attitude of mind proper to the study of physical nature. Still we have here an important conception to be exhibited. We wish an expressive phrase to designate that law which is supposed to be independent of human enactment. Here is one that just fits the case and that has been in use from the earliest times. It is bound to stay in spite of drawbacks, unless a satisfactory substitute is brought. What can be offered in its place? We might partially express the antithesis between positive law and natural law by calling the latter *God's* law. But, of course, this would not do; for it at once commits us to theism. Again, we might, with Hooker, say the law *of reason;* but the fact that this, though early introduced, has never gained currency, is sufficient proof that it is somewhere wanting. As a matter of fact, it is faulty in that it does not suggest to most minds a moral

[1] The use of the Latin *jus naturæ* avoids this ambiguity wherever it really exists.

element, that it commits us to certain theories of ethics, that it very faintly marks the antithesis to positive man-made law. Finally, we might say *moral* law. But this, again, will not answer. The terms natural law and moral law are not synonymous. They differ both in connotation and denotation. The epithet moral indicates the *sanction* of the law as being in conscience. Natural defines the *source* or *origin* of the law. If one's ethical philosophy permits him to believe that the free will of man can be the source of the moral quality of acts, that the fiat of the state is of itself sufficient to establish the validity of a rule of conduct, he is then perfectly at liberty to apply the phrase moral law to such a rule. But not so the phrase natural law. It declares on its very face that any principle of the action to which it is applied has an origin other than human enactment, and that it cannot justly be contravened by such enactment. Thus, while both moral and natural law are usually in antithesis to positive law, it is in different senses. So that, even if with the ancients we identify the domains of moral and natural right, still we have a difference in the attribute which in each case is put forward as the distinctive mark.

But not only are natural and moral law different as to connotation; they also have in modern times a different denotation. The class natural laws is by almost universal modern usage narrower than the class moral laws. The surface distinction generally accepted is well expressed without any implications as to theory by Professor Holland.[1] "Such of the received precepts of morality relating to overt acts, and therefore capable of being enforced by a political authority, as either are enforced by such authority or are supposed to be fit so to be enforced, are called the laws of nature." It is thus evident that the time has not come to accept moral law as a com-

[1] Jurisprudence, p. 29.

plete substitute for natural law. But no other candidate is offered. We are, therefore, brought to the conclusion that to designate the law which *ought* to be in antithesis to the law which *is*, we shall find it best, on the whole, to retain the old phrase natural law.

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